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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-1230

JOHN HENRY YOUNG,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

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OPINION BELOW

Petitioner, John Henry Young, hereby applies for a writ of certiorari directed to the California Court of Appeal, Second Appellant District, to review the judgment rendered by said court and allowed to stand

by the California Supreme Court through denial of a petition for hearing therein, in the above-entitled cause. The opinion of the California Court of Appeal is appended hereto and designated as Appendix "A" to this petition. The decision of the California Supreme Court denying hearing herein is appended hereto and designated as Appendix "B" to this petition.

JURISDICTION

The judgment of the California Court of Appeal in the instant matter was rendered October 18, 1972. A hearing by the California Supreme Court was denied and the judgment of the California Court of Appeal thus affirmed December 13, 1972. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, United States Code §1257(3). Compliance with the time limitations of Rule 22(1), United States Supreme Court Rules, has been had.

NATURE OF CASE AND ISSUE PRESENTED

The instant case concerns a charge of marijuana possession for purposes of sale, a violation of California Health and Safety Code §11530.5. The issue presented is the propriety under the Fourth Amendment to the United States Constitution of the search and seizure by which the physical evidence supporting the charge was discovered and the admissibility of such evidence against petitioner in the trial of his case.

REASONS FOR HEARING

A hearing is respectfully requested in the instant case for the following reasons:

1. The decision below affirms a search and seizure of evidence predicated on an informant's information and police officer observation in direct contravention of the precedent decisions of this Court in the following cases:

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964);

Spinelli v. United States,
393 U.S. 410, 89 S. Ct. 584,
21 L.Ed.2d 637 (1969);

Whitely v. Warden, Wyoming State
Penitentiary, 401 U.S. 569,
91 S. Ct. 1031, 28 L.Ed.2d 306
(1971).

2. The decision below affirms a search and seizure of evidence predicated on a pretext arrest in direct contravention of the precedent decisions of this Court and the Court of Appeals in the following cases:

United States v. Lefkowitz,
285 U.S. 452, 52 S. Ct. 420,
76 L.Ed. 877 (1932);

Henderson v. United States,
12 F.2d 528 (C.A.D.C. 1950);

McKnight v. United States,
183 F.2d 977 (4th Cir. 1926).

3. The decision below affirms a search and seizure of evidence in contravention of the Fourth Amendment to the United States Constitution, made applicable to the states by the decision of this Court in the

case of Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961).

4. A hearing by this Court is thus required to conform the instant case with the cited authorities and to accord petitioner the proper protection against an unreasonable search and seizure in the premises.

OUTLINE OF CASE

Petitioner and one Grady Roger McCloud were arrested in a Los Angeles residence on December 5, 1968 consequent upon a police investigation which followed the receipt by an officer of information from an informant respecting narcotics dealings by petitioner. A search of that residence and an adjoining garage revealed a quantity of marijuana. The sufficiency of the information and corroborative effect of the investigation to support an arrest and the relationship between the arrest and ensuing search are the questions presented for consideration by this petition and will be treated below.

PROCEDURAL INFORMATION

Petitioner and Grady Roger McCloud were jointly charged in Count I of Information No. A 239568, filed February 6, 1969 in the Los Angeles Superior Court, with a violation of California Health and Safety Code §11530.5 (possession of marijuana for sale), allegedly occurring on December 5, 1968. In addition, petitioner was charged individually in Count II of the information with a violation of California Penal Code §12020 (unlawful possession of a restricted firearm), allegedly occurring the same date (C.T. pp. 543-544).

Petitioner pleaded not guilty to the charges contained in the information and moved pursuant to California Penal Code §1538.5 to suppress the physical evidence forming the basis of the charged offenses on the ground the same was the product of unlawful searches and seizures. The motion was heard as a de novo proceeding pretrial, and granted as to evidence found at one location (identified as exhibits 4, 5 and 6 at the hearing of the motion) and denied as to all remaining exhibits, which were

found at a second location (identified as exhibits 1, 2, 3, 7, 8 and 9 at the hearing of the motion) (C.T. pp. 550, 571-576).

Petitioner thereafter waived jury trial in his case and submitted the matter for decision on the testimony adduced at the preliminary hearing and the motion for suppression of evidence as contained in the reporters' transcripts of those proceedings. He was thereupon adjudged guilty as charged in Count I of the information and not guilty of Count II (C.T. pp. 581, 584).

Petitioner appeared for probation and sentence hearing in his case on September 8, 1971, at which time probation was denied and he was sentenced to prison for the prescribed legal term. He timely filed a notice of appeal from the judgment rendered against him, and the matter was heard by the California Court of Appeal and the judgment affirmed. A hearing was thereupon sought in the California Supreme Court and the same denied. Application for a writ of certiorari is now made to this Honorable Court for the reasons heretofore expressed, and the cause is thus submitted for appropriate review and consideration. Bail on

appeal was set by the trial court and posted by petitioner who is presently at liberty on bond pending determination of these proceedings (C.T. pp. 586, 588).

FACTUAL INFORMATION

The single contention raised on appeal pertains to the validity of the search and seizure producing the evidence supporting the charge on which petitioner was found guilty. Although petitioner at trial denied possession of the subject evidence, the trial court's finding against him on this issue is supported by the evidence of record and presents no appellate question. Accordingly, only the evidence taken at the hearing of petitioner's suppression motion under California Penal Code §1538.5 requires consideration. This evidence is contained in the Clerk's Transcript on Appeal, pages 177-542, and all page references following pertain thereto.

Two principal witnesses testified at the hearing of the motion, both being Los Angeles police officers assigned to the narcotics detail. The first to testify was

Fred J. McKnight and the second Marshall F. Gaines. The expertise of each in the field of narcotic law enforcement and the means and manner of narcotic possession, packaging, and distribution was stipulated to by the parties (C.T. pp. 189, 345-346).

Officer McKnight testified that in early November, 1968 he was told by a suspect in a narcotic investigation that there was a male Negro who lived in about the 4100 block of Coliseum Drive, Los Angeles who drove a Toronado automobile and who was a large marijuana distributor. McKnight had never previously received information from this source nor did he thereafter use him as an informant. With this information in mind, McKnight checked the area around the 4100 block of Coliseum Drive and did observe a Toronado automobile on one or two occasions parked in the garage attached to the rear of the apartment complex at 4620 Coliseum (C.T. pp. 190-192).

On or about December 1, 1968 McKnight received information from a person he considered reliable because of information provided by this source in the preceding few months which had led to arrests and

seizures of evidence in two pending cases. This informant told him that there was a male Negro named John who lived on Coliseum and drove a new, 1968 Toronado whose telephone number was 296-4407, that by calling that number marijuana could be ordered from John who was extensively involved in marijuana dealing, that a female also lived at the same location and took orders for marijuana when John was away, that John did not keep his main marijuana supply at the Coliseum location but at a residence at 6015 Madden Street, that another person usually stayed with the supply on Madden Street and drove a 1961 green Falcon automobile with the license plate numberals 345, and that John carried a sawed-off shotgun with him when conducting his narcotic transactions (C.T. pp. 192-197). On December 5, 1968 McKnight then received additional information from this same informant that John had just received about 100 kilos of marijuana which he was storing at the Madden Street house and which he was then intending to sell and distribute (C.T. p. 198). In the first conversation McKnight asked the informant how he knew about the marijuana supply at the Madden

Street location, and the informant replied "he had been there with . . . John on one prior occasion and he knew this to be where the narcotics were stashed", however, the informant did not state to McKnight how long before relating his information he had been at that location (C.T. pp. 198-199).

After receipt of the information from his informant on December 1, and prior to December 5, McKnight made an investigation of the information received. He checked the telephone number given him and found it to be registered to a Gloria Bowie at 4620 Coliseum, apartment 103. He then checked the utilities for that apartment and found them to be registered in the name of John Young. Then, on December 5, about 5:30 p.m., together with other police officers working with him, and to whom he had related all the foregoing information, McKnight commenced a surveillance on the rear of 4620 Coliseum (C.T. pp. 199-205).

At about 6:30 p.m. he observed petitioner and a second person enter the 1968 Toronado he had previously seen at the location and petitioner drive it to a gas station, which was closed for business, at

45th Street and Crenshaw in Los Angeles. Shortly after petitioner arrived at the gas station two other vehicles, a 1961 or 1962 Falcon with the license plate numerals 345, and a 1967 Lincoln, license number WZT 317, also arrived, with three occupants in the Lincoln and only the driver in the Falcon. At the gas station petitioner left his car and walked to the Lincoln and the driver of the Falcon did likewise. These men then held a brief conversation at the driver's side of the Lincoln after which petitioner returned to his vehicle and drove away from the location. At that time, McKnight could only identify the driver of the Falcon as a male Negro about five feet, ten inches tall (C.T. pp. 205-207).

McKnight then proceeded to follow petitioner and noticed the Falcon beginning to move from the gas station as he left but the Lincoln remaining stationary. The Toronado driven by petitioner was followed by McKnight for about a half hour along a number of different streets in the south Los Angeles area making only traffic stops during this time, and McKnight then observed it enter and park in a Thrifty Drug Store

parking lot at the corner of Crenshaw and Slauson. At this time petitioner exited his vehicle and entered the drug store and conversed with another person there. He returned to his car in about five to ten minutes and then drove back to the gas station at 45th and Crenshaw, which took about five minutes' time. When petitioner returned to the gas station the Lincoln was also there but not the Falcon. McKnight observed petitioner go to the Lincoln and speak with its occupants and then return to his car. The Lincoln then left the gas station, and McKnight commenced following the Lincoln. He saw it go south on Crenshaw to the first street past Slauson where it pulled into a drive-in restaurant lot and remained a short time, then exit that lot and drive north to Slauson, turn right on Slauson and park at the curb by the Thrifty Drug Store. At this time McKnight saw co-defendant McCloud appear from the area of a vacant building at that location and approach the Lincoln carrying a shopping bag. McCloud entered the Lincoln with the shopping bag, and the Lincoln then preceeding east on Slauson. McKnight attempted to follow the vehicle but shortly lost track

of it because of the fog which hampered visibility that night (C.T. pp. 207-216).

McKnight then returned to 4620 Coliseum and observed the Toronado parked in its garage stall. About 8:30 p.m. he saw petitioner get in the car and drive from the location. He followed the Toronado a short distance and then lost sight of it in the fog. A short time later McKnight received radio communication from Officer Gaines that the Toronado had arrived at 6015 Madden Street, and McKnight proceeded to that location. On arriving McKnight entered the residence and found petitioner, McCloud, and a third man under arrest and in the custody of Gaines and other officers. McKnight observed no furniture in the house. He saw Exhibit 1, a quantity of marijuana, on the living room floor near the arrestees. He then saw a set of keys (Exhibit 8) removed from petitioner and another set (Exhibit 9) removed from McCloud. One key on each set was found by McKnight to open a locked padlock (Exhibit 7) on the door of a detached garage at the address of arrest. In the garage McKnight found Exhibits 2 and 3, quantities of

marijuana, respectively. McKnight also determined that one of the keys on Exhibit 8 operated the front door lock at 6015 Madden (C.T. pp. 216-228). (Thereafter, McKnight entered and searched apartment 103 at 4620 Coliseum wherein he found Exhibit 4, a small quantity of marijuana, Exhibit 5, miscellaneous papers, and Exhibit 6, a sawed-off shotgun; however, these exhibits were ordered suppressed at petitioner's motion under California Penal Code §1538.5 and were not introduced or received at trial, and accordingly the circumstances attendant on their search and seizure need not be detailed herein.)

McKnight did not consider the person who gave him the information in early November to be a reliable informant but did so consider the informant who provided him information on December 1 and 5, 1968 (C.T. pp. 236-237). This latter informant told McKnight he had been to 6015 Madden with the person he referred to as John, but did not tell McKnight that he had ever been inside apartment 103 at 4620 Coliseum or had ever been present when orders for marijuana were taken at that location (C.T.

262-265). When he spoke to McKnight on December 5 and told him that John was then in possession of a large quantity of marijuana at 6015 Madden Street, this informant did not state he had seen the marijuana there or had observed John engaged in selling or distributing such marijuana (C.T. 272-273).

Marshall F. Gaines then testified at the hearing of the motion under California Penal Code §1538.5 that McKnight had related to him the information received from the second informant and that on December 5, 1968 he participated in the investigation culminating in the arrests at 6015 Madden. Initially Gaines was present with McKnight at the rear of 4620 Coliseum when the Toronado automobile was first observed on that date. Gaines then proceeded in his own vehicle to a nearby location and parked, maintaining radio contact with McKnight. He received a call from McKnight and drove to 54th and Crenshaw and parked near a closed gas station. He observed a 1961 Falcon at that location with the license numerals 345 and followed it when it left the service station. The Falcon drove to

and parked two houses south of 6015 Madden Street. At that time Gaines observed only one occupant in the vehicle, the driver, who was a male Negro. Gaines drove by the parked Falcon and about five minutes later returned to it. Some ten minutes afterward he observed a male Negro enter the Falcon and drive away. He identified this person as McCloud (C.T. pp. 343-351).

When Gaines saw McCloud enter the Falcon on Madden Street he observed McCloud to have a shopping bag with him. He followed the Falcon as it left the location but lost sight of it after it turned a corner. Gaines then went to the Thrifty Drug Store parking lot at Slauson and Crenshaw, which was about two blocks from 6015 Madden. At that location he observed the Toronado seen earlier. He then left the parking lot and noticed a Lincoln, which he had previously seen at the gas station at 45th and Crenshaw, driving south on Crenshaw. Gaines followed this car to a hotdog stand where it remained briefly and then back north on Crenshaw to Slauson where the car turned east and parked. At this time Gaines observed McCloud appear

from a darkened doorway at that location and enter the Lincoln along with the shopping bag he was carrying. Gaines then followed the Lincoln but lost it after a short distance. He then proceeded to 6015 Madden Street where he parked and waited with other officers (C.T. pp. 351-355).

About an hour later, Gaines observed two automobiles arrive at 6015 Madden, a Mercury and the Toronado previously referred to. The Mercury had one occupant and the Toronado two, petitioner, who was driving, and McCloud, who was a passenger. These three persons entered the residence at 6015 Madden, and Gaines and his fellow officers then approached the house. Gaines went to the door and through an adjacent window observed the three men inside in the living room. He knocked loudly on the door, announced his presence and identified himself as a police officer, and demanded entry. Upon his doing so the three men in the house ran from the living room. Gaines yelled to them they were under arrest and to exit the premises. When he received no response to this, he forced entry and effected the arrest of petitioner, McCloud,

and the third man inside the house. He then made a search of the house, and in a bedroom closet on a shelf he found exhibit 1, a quantity of marijuana, which he placed in the living room where McKnight observed it when he arrived on the scene (C.T. pp. 355-362). It was Gaines' opinion, based on the information he had received from McKnight and the observations he made that evening, that one narcotics transaction had been conducted and a second about to take place at 6015 Madden, and that narcotics were then possessed at that location; and he determined to make the arrests of the men he observed enter the premises on the basis thereof (C.T. pp. 362-368).

At the time the Mercury and Toronado arrived at 6015 Madden and the three occupants of these two vehicles approached and entered the house, a police car with three officers was parked in the driveway of the location, while Gaines was himself parked on the street 100 to 150 feet from the house (C.T. pp. 383-386, 423, 451-543). Gaines had decided to arrest the men he observed exit the Mercury and Toronado and enter 6015 Madden for the offense of

possession of narcotics for sale prior to his own going onto the front porch and looking through the window of the residence, and upon their arrest he then assisted in a search of the premises for narcotics (C.T. pp. 468-471).

The foregoing in substance concluded the testimony given at the hearing of petitioner's motion to suppress evidence under California Penal Code §1538.5 and provided the basis for the trial court's ruling adverse to petitioner respecting exhibits 1, 2 and 3 (marijuana found on closet shelf and in garage of 6015 Madden Street) and exhibits 7, 8 and 9 (padlock from garage of residence and keys taken from petitioner and McCloud). The receipt of said exhibits at trial formed the basis of petitioner's conviction of Count I of the information and constitutes the assigned error on appeal.

PETITIONER'S POSITION

Petitioner contends that the search and seizure producing the disputed exhibits in the instant case was improper for two

reasons: first, because it was predicated on a warrantless arrest made without probable cause, and second, because such arrest was utilized as a pretext for the intended purpose of the officers to conduct a warrantless search of particular premises. These points will be developed and treated in the discussion below.

ARGUMENT

A

Lack of Probable Cause

The instant case involves a warrantless arrest and search and seizure of evidence. Although the test of probable cause is fundamentally the same in such instance as where a warrant is had, the use of a warrant remains the preferred procedure. United States of Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L.Ed.2d 684 (1965); Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed. 2d 697 (1960). Accordingly, what would be inadequate to constitute probable cause to support a warrant equally fails as probable cause to support warrantless action, and

the decisions of this Court in the former area fully apply as precedents in the latter.

Analysis of the case at bar requires at the outset a consideration of this Court's pronouncements in the case of Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964). In Aguilar it was held, respecting a search warrant affidavit, that where information from an informant is relied on as the basis for probable cause, it must be shown both that the informant is reliable and that the informant speaks from personal knowledge respecting the information related. A failure in either particular renders the information inadequate as probable cause, and action predicated thereon involving a search and seizure is therefore violative of the Fourth Amendment.

The Aguilar decision has received recent reiteration by this Court in the case of Whitely v. Warden, Wyoming State Penitentiary, 401 U.S. 569, 91 S. Ct. 1031, 28 L.Ed.2d 306 (1971), and the two fold requirement of Aguilar regarding an informant's information thus remains the applicable law in the probable cause area under discussion. This area, it appears, is

directly involved in the instant action.

In the present case a claimed reliable informant provided information to a police officer, in person on one occasion and by telephone on a second occasion a few days later, regarding the narcotic dealings of a described suspect. Because the informant had previously given information to this officer, McKnight, which proved valid, his alleged reliability is not contested. However, the second, and co-equal, facet under Aguilar the personal knowledge basis of the informant, is not established by the record at bar. Thus on neither occasion does it appear that McKnight inquired of his informant how he knew or acquired the information which he supplied, whether from personal observation of or involvement in the subject narcotic transactions, or by hearsay related to him by others, nor does it appear that the informant specified his source when providing the information.

The most the instant record reflects in this regard that the informant told McKnight that he, the informant, had once been to the Madden Street residence with the man he referred to as John and that "he knew" this

to be where the narcotics were kept. However, in this connection the informant failed to disclose how long previously he had been to that location, or what he did or observed there with respect to narcotics, or how "he knew" narcotics were kept there, which, of course, is the essence of the Aguilar requirement. Moreover, the informant failed even to indicate that he had ever been to the Coliseum Street apartment which he referred to, or telephoned that location, or ordered or witnessed someone else order marijuana from that address or through its telephone number. And, on December 5th, the occasion of the telephone call, no specifics whatsoever were provided by the informant to substantiate his information that "John" had then acquired a large quantity of marijuana, which was stored at the Madden Street house and which was to be sold and distributed by him, or to show that this information was predicated on the informant's personal knowledge of the facts.

As a consequence of the foregoing, the information provided McKnight by his informant would not, under the Aguilar and

Whitely decisions, constitute probable cause in the case at bar and thus would not, alone, support an arrest or search. McKnight and his fellow officers apparently recognized this circumstance and accordingly sought to corroborate the information received through their own independent investigation. In connection with this investigation certain conduct on the part of petitioner and others was observed by them to transpire. However, this conduct consisted essentially of people meeting one another in public and making arrangements for matters between themselves and was in no respect improper or illicit as such. Indeed, it was conduct wholly innocuous in character and proper for any citizen to engage in without fear of arrest or detention, and it assumed an aura of suspiciousness to the officers only by virtue of what McKnight's informant had related.

In this respect the observed conduct parallels that which was sought to be relied on for corroboration in the case of Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed.2d 637 (1969), and which this Court held insufficient for such

purpose in that case notwithstanding the involvement of a search warrant. In Spinell as here, the personal knowledge basis of the informant's information was not disclosed, and the officers there sought to corroborate their "tip" by checking telephone listings at particular apartments and by surveilling the movements of the suspect with respect to these apartments. Essentially little more was done in the instant case, although in this connection the surveillance here included the movements of several persons who met with petitioner.

However, the conduct so observed remained essentially nonculpatory, nor did it correspond in detailed fashion to what the informant had described, as was the case in Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L.Ed.2d 327 (1959). In the instant case the informant only generally mentioned the narcotic activity of the suspect referred to and did not relate a specific course of conduct which, when observed, would have reflected the requisite personal knowledge on his part, which was the essence of Draper. Rather, the broad outline of illegal conduct related

by the informant in the present matter was comparable to the informant's information as given in Spinelli, and the conduct observed on surveillance by the officers thus could not be particularized with respect thereto. Accordingly, the lack of personal knowledge on the part of the informant in the case at bar was not remedied by the investigation of the officers and probable cause thus failed to be established by the instant record.

Indeed, to hold otherwise would, it is submitted, create an interesting but untenable example of circuitous reasoning, for it must be borne in mind that it is not the informant's information which must cast suspicion on the conduct observed but rather the conduct which must corroborate and lend credence to the information and show that the informant speaks from personal knowledge of the facts related. However, if the conduct itself is innocent and does not correspond in detail to the information given, and requires consideration of that very information even to become suspect, can it then rationally serve to corroborate that information? In effect, can the

circumstance requiring corroboration be used to add substance and meaning to the circumstance relied on for corroboration, or is this not an impermissible round of circuitous logic which has no place in the probable cause equation pertinent to a determination of the propriety of an arrest and search and seizure.

The answer to the foregoing queries appears manifest and leads to one obvious conclusion: corroboration for an informant cannot be predicated on legitimate activity of a person publicly conducted which apart from the information requiring corroboration contains no aura of suspicion or suggestion of impropriety. Thus, when Officer Gaines in the present case determined to arrest petitioner and the two men with him at the Madden Street location, he acted precipitously on the basis of his observations of innocent conduct coupled with inadequate information received from Officer McKnight's informant. This combination, it is submitted, did not warrant reliance on the latter and did not establish probable cause for the arrests made. The ensuing search for and seizure of evidence was therefore

unlawful, and the exhibits recovered at the Madden Street residence should have been suppressed on petitioner's motion below. The receipt of such evidence at trial was thus violative of the Fourth Amendment, applicable to the states through this Court's decision in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961), and accordingly constitutes reversible error herein which now requires action by this Court to be remedied.

B

Arrest As Pretext For Search

A second and independent ground for invalidating the search and seizure in the instant case must now be considered. The basis of contention in this regard is that, assuming arguendo a probable cause basis for petitioner's arrest, nonetheless the arrest, under the circumstances presented, was in effect an impermissible subterfuge on which to predicate a search and the search and not the arrest was the true intent of the officers in the case. However,

the law in this particular is clear and precise and to the contrary. As early stated by this Court:

> "An arrest may not be used as a pretext to search for evidence." United States v. Lefkowitz, 285 U.S. 452, 467, 52 S. Ct. 420, 424, 76 L.Ed.2d 877, 884 (1932)

and where such occurs the search cannot withstand constitutional scrutiny.

In the present matter what the officers wished to do was search the Madden Street house and the Coliseum Street apartment, and to do so without first obtaining a search warrant for those premises. To accomplish a search of the former location (the subsequent search of the latter was struck down by the trial court), the officers had to effect an arrest on the premises. Vale v. Louisiana, 399 U.S. 30, 90 S. Ct. 1969, 26 L.Ed.2d 409 (1970). An arrest outside the location would not have sufficed for this purpose, and thus the officers conveniently passed the opportunity to make an arrest as petitioner and his companions were approaching the Madden Street house to enter it, and walked within

twenty-five feet of three officers in a car parked in the driveway of the premises (C.T. p. 453). Instead, the officers waited until these men entered the location to arrest them, notwithstanding the fact that an arrest of suspects in open view manifestly entails less danger than the arrest of suspects in open view manifestly entails less danger than the arrest of suspects in a concealed position. However, only the latter arrest would permit, as an alleged incident, the desired search of the premises.

In this respect the case at bar parallels that of McKnight v. United States, 183 F.2d 977 (C.A. D.C. 1950) where officers also avoided a convenient opportunity to effect a lawful arrest of a suspect on a public street and instead allowed him to enter a residence which they then broke into to make the arrest, and which they then immediately proceeded to search. The court in McKnight readily recognized the intent of the officers in the case to be a search of the location of arrest, and after first reiterating the exerpt from Lefkowitz quoted above, went on to state:

"It is settled law that 'when it appears, as it does here, that the search and not the arrest was the real object of the officers in entering upon the premises, and that the arrest was a pretext for or at most an incident of the search,' the search is not reasonable within the meaning of the Constitution."

183 F.2d at p. 978.

The court then concluded that the search there involved was of this character and thus was violative of the Fourth Amendment guarantees.

It is, it is submitted, difficult to distinguish McKnight from the instant case factually, and legally, it is urged, the same result should obtain. Manifestly, in the present case, an arrest of petitioner would have served no useful purpose absent the discovery of narcotics in his possession, since nothing learned or observed prior to his arrest would have sufficed as evidence to support a conviction at trial. Equally clear, then, was the need of the

officers to find such narcotic evidence, and this required a search of the Madden Street (and Coliseum Avenue) premises. As in McKnight, so too here, the real object of the officers thus was the search and not the arrest. Indeed, if the search proved fruitless, the arrest would not have proceeded to prosecution, and the arrest was, accordingly, but an incident of the search. However, the Constitution does not permit a search to be so predicated and requires instead a search warrant to be obtained in such circumstances. The warrantless action of the officers below, therefore, was improper, and the fruits thereof thus illegally obtained, and the same would not have been received at petitioner's trial.

Appropos in this connection appears to be the language and determination, of the Court of Appeals in the case of Henderson v. United States, 12 F.2d 528 (4th Cir. 1926), which early considered the issue under discussion. The court there stated, at pages 528-529:

> ". . . and a careful consideration of the evidence leads irresistably to the conclusion

> that the search of [defendant's] dwelling was made, not as an incident of the arrest, but as the chief object which the officers had in view in entering upon his premises. Instead of the search being incidental to the arrest, therefore, the arrest was incidental to if not a mere pretext for the search. The question is whether a search made under such circumstances violates the constitutional rights of the defendant. We think that it does."

This view, as noted above, was accepted by this Court in United States v. Lefkowitz, supra, and followed in the McKnight decision. It remains sound law today and is fully applicable to the case at bar. On the basis thereof it must be concluded that the warrantless conduct of the officers in the instant case was constitutionally impermissible and accordingly requires action by this Court to be remedied.

CONCLUSION

The instant case is one where police officers, acting without warrant, recognize the need for investigative corroboration of an informant's information to support a suspect's arrest. Their investigation, however, reveals conduct and movements by individuals only of innocuous character. To then render such activity suspicious by reference to the informant's information is, it is submitted, to reverse the corroborative process, and then to use the activity thus rendered suspect to corroborate the information in order to justify reliance upon it, is to engage in circuitous reasoning of a patently unacceptable nature. Yet, just such logic is presented in this case as the predicate for official action.

Essentially, however, in law and in logic, it is the character of the activity observed which must lend credence to the information received, not the content of that information which may be used to transform legitimate civilian action into illicit transaction. What was observed by

the officers in the instant case was not tainted except as interpreted by the information provided by the informant; it cannot, therefore, properly serve to corroborate such information and support an arrest based thereon.

In addition, in the present case the manifest purpose of the officers was to conduct a warrantless search of a residence, and their use of an arrest as the ostensible basis to accomplish this purpose is, under the applicable law, improper. Accordingly, for this reason also, the search for and seizure of evidence herein was unlawful, and the same should have been suppressed at trial. It is acknowledged that the consequence thereof would be to exclude a significant quantity of marijuana from trial consideration, however it is respectfully submitted that it is at least equally important for law enforcement officers to comply with the law governing their conduct as for civilians to do so. In this regard only do we remain a nation of laws rather than one of men.

APPLICATION

Accordingly, it is respectfully submitted, for the reasons presented and on the basis of the authorities cited, that petitioner's position herein is sound and should be sustained, and it is thus requested that the within petition for writ of certiorari be granted and the matter set for hearing on the Honorable Court's docket.

Respectfully submitted,

HOWARD E. BECKLER

Attorney for Petitioner

EXHIBIT A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, vs. GRADY ROGER McCLOUD, JOHN HENRY YOUNG, Defendants and Appellants.	) Crim. No. 21035) (Superior Ct. No. A239568) FILED OCT 18 1972 Clay Robbins, Clerk

APPEALS from judgments of the Superior Court of Los Angeles County. William R. Clay, Judge. Affirmed.

Richard H. Levin, under appointment by the Court of Appeal, for Defendant and Appellant McCloud.

Howard E. Beckler for Defendant and Appellant Young.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, William E. James, Assistant

Attorney General, William R. Pounders and Geoffrey S. Cantrell, Deputy Attorneys General, for Plaintiff and Respondent.

After a court trial, defendants Grady Roger McCloud and John Henry Young were convicted of possession of marijuana for sale (Health & Saf. Code, § 11530.5). Each is appealing from the judgment. The People's case was submitted by stipulation upon the transcripts of the preliminary hearing and the special hearing under Penal Code section 1538.5. Defendant Young testified at the trial and called one other witness. No other defense evidence was offered.

The issues on this appeal are the legality of the seizures of the marijuana, and the sufficiency of the evidence to support the conviction of each defendant.

Evidence

In early November 1968, an untested informant told Los Angeles Police Officer McKnight that a male Negro who lived in the 4100 block on Coliseum and drove a late

model Toronado was a big dealer in marijuana. The officer looked around the neighborhood and the only Toronado he saw was parked behind the apartment house at 4620 Coliseum. Later that month he staked out the area and observed defendant Young driving the Toronado.

About December 1, 1968, a tested, reliable informer, whose information had led to the recovery of drugs in at least two cases, told Officer McKnight that a big dealer in marijuana was a male Negro named John, who drove a new 1968 Toronado, lived on Coliseum, and had a telephone number of 296-4407. He said further that John kept his narcotics in a residence at 6015 Madden. The informant had been at the Madden house with John. The informant also said another individual "sat on his stash at the Madden Street location" and drove a green 1961 Falcon, with numbers 345 on the license plate.

A utilities check showed that the telephone number 296-4407 belonged to apartment 103 at 4620 Coliseum; and that the water and power service for that apartment was in the name of John Young.

On December 5, 1968, the tested informant told McKnight that John had just receive 100 kilos which were stashed at the Madden Street location. That evening McKnight and several officers, driving separate vehicles and communicating with each other by radio, staked out the neighborhood. About 6:30 p.m Young and another man walked from the apartment at 4620 Coliseum, entered the Toronado and drove to an out-of-business service station at 54th and Crenshaw where Young met with the occupants of two other cars, one of which was a green Falcon with the 345 plates, and the other was a Lincoln. Thereafter Young then departed in his Toronado, drove around for 30 to 45 minutes, stopped at a shopping center at Slauson and Crenshaw, and returned to 54th and Crenshaw, where the Lincoln was. Young conversed with the driver of the Lincoln, who then drove away, stopped at a hamburger stand for 15 minutes, and stopped again near the shopping center at Slauson and Crenshaw.

Meanwhile the Falcon had parked close to 6015 South Madden, where defendant McCloud had entered the car carrying a large paper shopping bag. The Falcon

arrived at the Slauson and Crenshaw shopping center, where McCloud went into a drug store and returned to the car. At that time the Lincoln was parked nearby on Slauson. McCloud was then seen carrying the shopping bag which he placed in the back seat of the Lincoln and entered the Lincoln, which went away. Due to fog the officers were unable to follow the Lincoln.

About an hour later both Young and McCloud were seen to arrive at the Madden address in the Toronado. A man named Jones arrived in another car. The three men then entered 6015 Madden.

Officers Gaines knocked loudly on the front door, announced that he was a police officer on a narcotics investigation and "I demand admittance." Through the glass in the door he could see the three men inside. When he made his demand, all three looked in the direction of the front door, then ran towards the kitchen, and the lights went out. Officers then broke into the house and arrested the three men.

A search of the house disclosed in a bedroom closet a duffel bag containing nine

kilos of marijuana. A search of the defendants revealed that each carried a set of keys. One of Young's keys fit the front door of the house and one fit the padlock on the garage behind the house. One of McCloud's keys also fit the garage padlock. There was no furniture in the Madden Street house.

The officers then entered the garage and seized two duffel bags containing a large number of kilos of marijuana.

Analysis

The December 1, 1968, informant's report, plus other circumstances, gave probable cause to arrest defendant John Henry Young. The credibility of the informant was shown by his accurate information in prior cases. The other prong of the test -- the basis of the informant's report -- was established by his statement that he had visited the Madden Street house with John. Officer McKnight testified: "I asked him on one occasion -- I believe it was the initial conversation I had with him -- how he had known about the stash at

6015 Madden, and he stated he had been there with the individual known as John on one prior occasion and he knew this to be where the narcotics were stashed."

Although the informant was not quoted as using the words "I saw the narcotics there," this was a fair interpretation of what he said.

The report of the tested informant was corroborated in several respects by the report of the untested informant, by the officers' own investigation, by what the officers observed the evening of December 5, and by the behavior of defendants when the officers identified themselves at the door of the unfurnished house.

Officer Gaines complied with Penal Code section 844 by identifying himself as a police officer on a narcotics investigation and demanding admittance. When he saw the defendants look towards the door and retreat, he reasonably concluded that admittance was being refused so he lawfully forced entry.

Thus the arrest of Young inside the Madden Street house was lawful.

Since the arrest was in 1968 (pre-Chimel), the area which could lawfully be searched as an incident of the arrest included the bedroom closet. (See People v. Edwards (1969) 71 Cal.2d 1096, 1106-1108.) Thus the nine kilos were properly seized.

The arrest of McCloud was also lawful. He had been seen carrying a shopping bag away from the Madden Street house, and riding in the green Falcon (which the tested informant had said was used by John's accomplice) to a rendezvous on a public street, where he delivered the bag to a Lincoln automobile. This transaction was preceded by an earlier conference at an abandoned gas station, and some driving about the city without apparent purpose except perhaps to kill time and avoid making the parties conspicuous. In the light of the informant's report, the officers could reasonably believe that McCloud was making a delivery of contraband to a person in the Lincoln. This inference was reinforced by the observation that McCloud returned with Young soon afterwards to the Madden Street house which the informant

said was used only for storage and narcotics, and by the behavior of all of the men in house when the officers identified themselves. The lawful search of the house (incident to the arrest of Young) established that the house contained kilos of marijuana, and nothing else. It was reasonable for the officers to infer that as a practical matter a narcotics dealer will not escort to his "stash" anyone who is not also involved in the criminal enterprise. Upon all of this the officers reasonably concluded that McCloud was criminally involved, so his arrest there was lawful.

There is no merit in the argument of defendant Young that their arrest was a pretext for the search. The officers did not take defendants to the place they wished to search, as in People v. Haven (1963) 59 Cal.2d 713, 719.

The search of the detached garage was a proper incident of the arrest under the California decisions prior to Chimel. (See People v. Medina (1972) 7 Cal.3d 30, 38; People v. Dixon (1956) 46 Cal.2d 456, 458-459.) If we assume that the search of the garage was improper under pre-Chimel

standards interpreted post-Chimel in Vale v. Louisiana (1970) 399 U.S. 30, 33, the error was harmless beyong a reasonable doubt. The nine kilos stored in an otherwise empty house clearly were possessed for sale rather than for personal use. Thus the discovery of the additional quantity in the garage added nothing of substance to the People's case.

The evidence of guilt was sufficient as to both defendants. Dominion and control of the marijuana by Young was established by his possession of keys to the house and to the garage, by his presence in the house, and by his reaction when the police demanded admittance. Defendant McCloud also possessed a key to the garage. He was obviously associated with Young in whatever enterprise they were engaging in that evening, as he had carried a large bag away from the stash house early in the evening and had returned to the house with Young later. It is a reasonable inference Young would not have brought him there unless McCloud also had an interest in the only thing the house was being used for, the storage of marijuana for sale. It was

reasonable to infer that McCloud was jointly in possession of the kilos inside the house.

The judgments are affirmed.

NOT FOR PUBLICATION.

FILED, P.J.

We concur:

KINGSLEY, J.

DUNN, J.

EXHIBIT B

Howard E. Beckler, Esq.

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People

vs.

Young & Mc. Claud

Respectfully,

G. E. BISHEL
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